

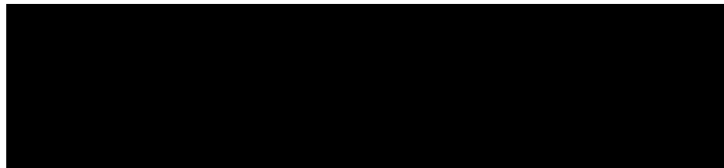
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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



**U.S. Citizenship  
and Immigration  
Services**

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**AUG 02 2010**

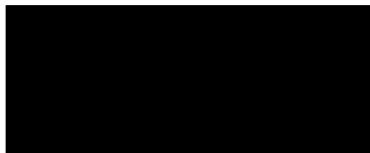
FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date:  
SRC-08-011-50465

IN RE: Petitioner:  
Beneficiary:



PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



**INSTRUCTIONS:**

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved.

The petitioner is a marketing company. It seeks to employ the beneficiary permanently in the United States as a marketing manager (director of marketing) pursuant to section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (Act), 8 U.S.C. §1153(b)(3)(A)(ii). The petition is accompanied by a copy of ETA Form 9089, Application for Permanent Employment Certification (ETA Form 9089), approved by the Department of Labor (DOL). Upon reviewing the evidence in the record, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a foreign degree equivalent to a U.S. bachelor's degree as required on the ETA Form 9089. The director denied the petition accordingly.

The record shows that the appeal is properly and timely filed, and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). On appeal, counsel asserts that the beneficiary is a professional with a foreign degree equivalent to a U.S. bachelor's degree based on her four-year diploma from Ontario College of Art (now Ontario College of Art and Design) alone. Counsel submits a brief and additional evidence to support his assertions on appeal and especially in response to the AAO's request for evidence (RFE). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal<sup>1</sup> and in response to the RFE.

As set forth in the director's July 22, 2009 decision, the primary issue in the current petition is whether the beneficiary possessed the requisite bachelor's degree for the proffered position.

Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

To determine whether a beneficiary is eligible for an employment based immigrant visa, U.S. Citizenship and Immigration Services (USCIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

(Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The petitioner must demonstrate the beneficiary's eligibility as of the priority date, the day the ETA Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d); 8 C.F.R. § 103.2(b)(12); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In this matter, the priority date is November 8, 2006.

Decisions by federal circuit courts, which are binding on this office, have upheld our authority to evaluate whether the beneficiary is qualified for the job offered.

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

*K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9<sup>th</sup> Cir. 1983). *See also Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *Black Const. Corp. v. INS*, 746 F.2d 503, 504 (9<sup>th</sup> Cir. 1984); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9<sup>th</sup> Cir. 1984). The court in *K.R.K. Irvine* relied on an amicus brief from the DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *K.R.K. Irvine, Inc.*, 699 F.2d at 1009.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Offer of Employment," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole. Regarding the minimum level of education and experience required for the proffered position in this matter, Part H of the labor certification reflects that a bachelor's degree in business, marketing or related, or a foreign equivalent degree and 48 months (four years) of experience in the job offered are required.

The ETA Form 9089 was filed and certified for the position of director of marketing. DOL assigned the occupational code of 11-2021.00, marketing manager, to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at <http://online.onetcenter.org/find/quick?s=11-2021.00> (accessed July 26, 2010) and its extensive description of the position and requirements for the position most analogous to marketing manager position, the position falls within Job Zone Four requiring "considerable preparation" for the occupation type closest to director marketing position. According to DOL, two to four years of work-related skill, knowledge, or experience is needed for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 7-8 to the occupation, which means "[m]ost of these occupations require a four-year bachelor's degree, but some do not." See <http://online.onetcenter.org/link/summary/11-2021.00> (accessed July 26, 2010). Additionally, DOL states the following concerning the training and overall experience required for these occupations:

A considerable amount of work-related skill, knowledge, or experience is needed for these occupations. For example, an accountant must complete four years of college and work for several years in accounting to be considered qualified.

Employees in these occupations usually need several years of work-related experience, on-the-job training, and/or vocational training.

*See id.*

Therefore, a director of marketing position could be properly analyzed as a professional since the most of these occupations require a four-year bachelor's degree. In this case, although the petitioner checked box e in Part 2 of the I-140 form, which is for either a professional or a skilled worker, the petitioner did not request for consideration under the skilled worker category when the director reviewed and denied the petition under the professional category. Further, the ETA Form 9089 does not indicate that the employer would accept any alternate combination of education and experience in lieu of the bachelor's degree requirement. Therefore, the AAO finds that the director properly analyzed this petition under the professional category.

For the professional category, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

The above regulations use a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language concerning the professional classification sets forth the requirement that a

beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

With the petition, the petitioner submitted the beneficiary's diploma of an Associate of Ontario College of Art in communication & design, design advertising in 1986 and transcripts for the four years of study at Ontario College of Art. The director determined that the beneficiary's diploma is not equivalent to a U.S. bachelor's degree and denied the petition accordingly. On appeal, counsel asserts that the beneficiary earned the diploma upon completion of four years of study at that college, and therefore, it should be evaluated as the equivalent of U.S. bachelor's degree in marketing. On May 10, 2010, the AAO served the petitioner a RFE for further evidence to establish the beneficiary's requisite qualifications. The response was received on July 2, 2010 and added in the record of proceedings.

While the transcript for the beneficiary's diploma program uses different measure of credit hours than most U.S. colleges, it is clear that the diploma of an Associate of Ontario College of Art is awarded upon completion of four years of study at the university level. The Ontario College of Art requires Ontario Secondary School Diploma (OSSD) for entry of the diploma program. The beneficiary possesses a diploma upon completion of four years post-secondary school study. A bachelor degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). Therefore, the beneficiary's four-year diploma in communication & design, design advertising from the Ontario College of Art (now Ontario College of Art and Design) is the foreign equivalent degree to a U.S. baccalaureate degree.

This office also reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officer (AACRAO). AACRAO, according to its website, [www.aacrao.org](http://www.aacrao.org), is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the registration page for EDGE, <http://accraoedge.aacrao.org/register/index/php>, EDGE is "a web-based resource for the evaluation of foreign educational credentials." EDGE confirms that the Ontario College of Art and Design is a public university in Ontario, Canada, the diploma program at Ontario College of Art and Design is a four-year full-time college program and the program requires an OSSD for entry.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. The petitioner provides evaluations from Westwood Evaluations and Professor James S. Gould of Pace University. These evaluations evaluate the beneficiary's four-year diploma of an Associate of Ontario College of Art in communication & design, design advertising as the equivalent to a U.S. bachelor's degree in marketing.

Therefore, the AAO finds that the beneficiary possessed the foreign equivalent to a U.S. bachelor's degree in business, marketing or related field, and thus, meets the minimum educational requirements set forth on the ETA Form 9089 for the proffered position in the instant case. Accordingly, the director's July 22, 2009 decision will be withdrawn.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

**ORDER:** The director's decision is withdrawn, the appeal is sustained and the petition is approved.